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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 696

BENJAMIN GUINNESS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 40-52) is reported at 73 F. Supp. 119.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1947. (R. 53.) The time for filing a petition for certiorari was extended on taxpayer's motion to March 31, 1948. (R. 54.) The petition was filed March 25, 1948. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether taxpayer's entire distributive share of the proceeds from the sale of 150,000 shares of the stock of Standard Power & Light Corporation on January 7, 1930, was taxable to him as an ordinary dividend under the provisions of Section 115(a) of the Revenue Act of 1928.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix, *infra*, pp. 16-17.

STATEMENT

The facts relating to the single issue presented to this Court may be summarized as follows:

Taxpayer was, at all times material, an individual subject of Great Britain, residing in France. During the calendar year 1929 and prior thereto, at least from July 1, 1925, he was a partner of Ladenburg, Thalmann & Company, an investment banking partnership with its principal office in New York City, New York. Taxpayer's interest in the partnership was, at all times mentioned, 21.345 percent. (R. 22, 34, 35.)

On December 8, 1929, taxpayer served notice upon the other partners of his intention to withdraw from the partnership as of December 31, 1929. Following extended negotiations, taxpayer's withdrawal became effective with the signing of an agreement for settlement of his interest in the assets of the continuing partnership on April 22, 1930. (R. 22-25.)

On August 6, 1931, taxpayer filed his federal income tax return for the calendar year 1930 disclosing ordinary net income in the amount of $4,263,853.94, a capital net loss of $17,615.77 and a tax liability of $842,160.20. That amount, together with interest of $1,765.08 on the first installment, was paid in quarterly installments prior to March 17, 1932.

There was included in the return, as dividends received by taxpayer, an amount of $4,746,441.57. The latter amount represented the correct value of taxpayer's interest in a distribution made January 7, 1930, being 21.345 percent of the total distribution. The facts underlying the distribution appear hereinafter. (R. 25-26.)

On June 19, 1925, Ladenburg, Thalmann & Company, hereinafter called the partnership, held 71,925 shares of stock of Pittsburgh Utilities Corporation which had been acquired at a cost of $959,311.75. On July 1, 1925, the partnership organized the Criterion Corporation, and exchanged the 71,925 shares of Pittsburgh Utilities Corporation stock for the entire capital stock of the Criterion Corporation. On the same day, the partnership also organized the Standard Utilities Corporation, and exchanged all the stock of the Criterion Corporation for all the stock of the Standard Utilities Corporation. On July 8, 1925, the partnership organized the Universal Utilities Corporation and subscribed for its entire capital stock for $400,000 in cash. On the same day the Standard Utilities Corporation transferred the entire capital stock of the Criterion Corporation to Universal Utilities Corporation for $400,000 in cash, and $4,700,000 in notes of the Universal Utilities Corporation. Also, on the same day, the Universal Utilities Corporation liquidated the Criterion Corporation, thereby receiving the 71,925 shares of Pittsburgh Utilities Corporation stock. From July 1, 1925, and at all times herein material, the partnership owned all of the stock of Standard Utilities Corporation. (R. 26.)

On July 8, 1925, Standard Utilities Corporation bought 15,000 shares of common stock of Standard Power & Light Corporation for $15,000 cash. On the next day, Universal Utilities Corporation sold the 71,925 shares of Pittsburgh Utilities Corporation stock for $2,094,087.28 in cash, and 150,000 shares of common stock of Standard Power & Light

Corporation of a fair market value of $3,010,000. Also, on July 9, 1925, Universal Utilities Corporation paid its notes to Standard Utilities Corporation in the amount of $4,700,000 with $1,690,000 in cash, and the 150,000 shares of Standard Power & Light Corporation stock. While the 15,000 shares of Standard Power & Light Corporation stock and the 150,000 shares of stock of the same corporation were not of the same class at the time of acquisition, the certificate of incorporation of Standard Power & Light Corporation was amended on May 4, 1926, to reclassify the stock into a single class known as common stock of that corporation, share for share, although no new certificates were issued for the stock mentioned until January 6, 1930. For convenience all of the stock will be referred to as common stock of Standard Power & Light Corporation without regard to its classification when acquired. The series of transactions above outlined fixed the "basis" of the Standard Power & Light Corporation common stock in the hands of Standard Utilities Corporation for determining the gain which arose from its sale on January 7, 1930. The agreed facts with respect to the results which flowed from the sale on January 7, 1930, appear hereinafter. (R. 26-27.)

On July 9, 1925, H. M. Byllesby & Company and/or Standard Gas & Electric Company owned the same number of shares of stock of Standard Power & Light Corporation as did Standard Utilities Corporation, namely 165,000 shares. On that date the partnership, representing the Standard Utilities Corporation, which owned 165,000 shares of the Standard Power & Light Corporation stock, and H. M. Byllesby & Company and/or Standard Gas & Electric Company, as owner of a like number of shares, deposited the 330,000 shares of stock in escrow with the Chemical National Bank of New York (which afterwards became the Chemical Bank & Trust Company) by an agreement prohibiting any party to the agreement from disposing of the escrowed stock

except by consent of the other parties. In order to permit certain exchanges, not material here, the escrow agreement of July 9, 1925, was dissolved on March 23, 1926, and a new agreement was entered into on April 23, 1926, by which the 330,000 shares of escrowed stock remained in escrow under substantially the same conditions with the Chemical National Bank of New York. (R. 27.)

On December 21, 1929, the partnership, H. M. Byllesby & Company, and United States Electric Power Corporation entered into a tripartite agreement under which the partnership agreed to sell, and United States Electric Power Corporation agreed to buy, the 165,000 shares of common stock of Standard Power & Light Corporation, owned by Standard Utilities Corporation, for $10,000,000 in cash and $15,000,000 in notes of the purchaser. The agreement provided that the sale should take place on January 2, 1930, if certain minor preliminaries had been taken care of by that time, but in any case before January 28, 1930. At the time of the execution of the agreement of sale, the partnership did not own any of the common stock of Standard Power & Light Corporation. However, as heretofore shown, Standard Utilities Corporation owned the 165,000 shares of the stock in question which had remained in escrow under the escrow agreement heretofore referred to, and the partnership owned all of the stock of Standard Utilities Corporation. (R. 27-28.)

On December 31, 1929, Standard Gas & Electric Company, H. M. Byllesby & Company, and the partnership delivered to the Chemical Bank & Trust Company a letter terminating the escrow agreement of April 23, 1926, in the event the sale of the 165,000 shares of common stock of Standard Power & Light Corporation (owned by Standard Utilities Corporation) was consummated pursuant to the agreement of December 21, 1929. (R. 28.)

On January 6, 1930, the Chemical Bank & Trust Com-

pany still held the certificates of the common stock of Standard Power & Light Corporation which had been in escrow, and on that date it was irrevocably instructed by the partnership to deliver a certificate for 165,000 shares of the reclassified stock to United States Electric Power Corporation upon receipt of the payment provided for by the contract of December 21, 1929, and the compliance by the parties concerned with the form commitments made in the contract. On the same day the United States Electric Power Corporation deposited with the Chemical Bank & Trust Company $10,000,000 in cash and its four promissory notes, each of a face value of $3,750,000, made to the order of the partnership. The United States Electric Power Corporation also irrevocably instructed the Chemical Bank & Trust Company to deliver the cash and notes to the order of the partnership in exchange for the certificate for 165,000 shares of the stock of Standard Power & Light Corporation. The above instructions were accepted by the Chemical Bank & Trust Company, and, simultaneously, arrangements were made for the bank to send a representative to Dover, Delaware, on the following day with the 165,000 shares of common stock of Standard Power & Light Corporation, the official check of the bank payable to the partnership, and the notes of the United States Electric Power Company. (R. 28-31.)

The stockholders of Standard Gas & Electric Company convened in Dover, Delaware, on January 7, 1930, at 9:30 a.m., and adopted the resolutions contemplated by the contract of December 21, 1929. The stockholders of Standard Power & Light Corporation met in Dover, Delaware, at 12:30 p.m., January 7, 1930, and adopted the minor amendments to its charter and the other resolutions contemplated by the agreement of December 21, 1929. The board of directors of Standard Gas & Electric Company convened in Dover, Delaware, at 1:30 p.m. on January 7, 1930,

and approved the proceedings of its stockholders in their earlier meeting. (R. 31.)

The board of directors of Standard Utilities Corporation convened in New York City on January 7, 1930, at 1:30 p.m., and adopted the following resolution (R. 32):

> Resolved, that Ladenburg, Thalmann & Co., for and on behalf of Standard Utilities Corporation, and without the necessity of disclosing Standard Utilities Corporation as the principal for whom they are acting be and they hereby are authorized on behalf of Standard Utilities Corporation, to negotiate and consummate a sale of Fifteen Thousand (15,000) shares of Common Stock of Standard Power and Light Corporation at the price of One Hundred Fifty Dollars ($150) per share and to cause certificates therefor to be delivered to the purchaser thereof and, upon receipt of the purchase price therefor in cash, to hold the same to the credit of this corporation and subject to the order of its officers;
>
> Resolved, that One Hundred Fifty Thousand (150,000) shares of Common Stock of Standard Power and Light Corporation be and they hereby are declared to be paid as a dividend upon all the outstanding shares of stock of this Corporation of each class, share and share alike, payable immediately to the holders of record thereof.

At the close of the meeting Walter T. Rosen, chairman of the board of directors of Standard Utilities Corporation and a member of the partnership, informed Moritz Rosenthal, president of Standard Utilities Corporation and also a member of the partnership, who was at Dover, Delaware, of the adoption of the foregoing resolutions and the transfer of 150,000 shares of the stock of Standard Power & Light Corporation to the partnership. (R. 32-33).

Thereafter, on January 7, 1930, the preliminaries required by the contract of December 21, 1929, having been complied with, Mr. Rosenthal caused the single certificate

for the 165,000 shares of the reclassified common stock of Standard Power & Light Corporation to be transferred on its books to the United States Electric Power Corporation. At the direction of the president of the United States Electric Power Corporation, the representative of the Chemical Bank & Trust Company thereupon delivered to Mr. Rosenthal the official check of the bank for $10,000,000 and the four promissory notes of the United States Electric Power Corporation in the aggregate amount $15,000,000, in payment for the 165,000 shares of common stock of Standard Power & Light Corporation. Check and notes were made payable to the partnership. The notes had a cash value on January 7, 1930, of $14,100,000. (R. 33.)

On January 1, 1930, the earnings and profits of Standard Utilities Corporation, accumulated after February 28, 1913, amounted to $4,358,861.29, and taxpayer's ratable share thereof was $930,398.94. The gain realized by Standard Utilities Corporation from the sale on January 7, 1930, of 15,000 shares of the stock of Standard Power & Light Corporation, was $1,949,400. Earnings from other sources from January 1 to January 7, 1930, inclusive, were $3,102.96. If the sale of the remaining 150,000 shares of stock of Standard Power & Light Corporation on January 7, 1930, is treated as a sale by or on behalf of Standard Utilities Corporation, the amount by which the consideration received for such stock in that sale exceeded the cost of such stock to Standard Utilities Corporation was $19,226,753.61. The stock of Standard Utilities Corporation was continuously owned by the partnership after July 8, 1925. Taxpayer was a member of the partnership during the entire period from July 8, 1925, to December 31, 1929, inclusive, and his ratable interest in the stock of Standard Utilities Corporation, as a member of the partnership, remained the same throughout, namely 21.345 percent of the total stock outstanding. (R. 34.)

On December 12, 1932, taxpayer filed a claim for refund of $277,163.53 for the calendar year 1930 on the ground that the distribution made to him by Standard Utilities Corporation on January 7, 1930, and heretofore described in connection with the sale of 165,000 shares of stock of Standard Power & Light Corporation, which taxpayer had included in his return as dividends in the amount of $4,746,-441.57, was taxable as ordinary income only to the extent of $44,237.16, for the reason that taxpayer's share of the accumulated earnings and profits of Standard Utilities Corporation available for distribution on that date was not in excess of that amount. The claim urged that the excess of the distribution represented only a capital gain to taxpayer and, as such, was taxable at 12½ per cent under the provisions of Section 101 of the Revenue Act of 1928. (R. 37.)

On June 19, 1933, the Commissioner of Internal Revenue advised taxpayer that the claim for refund would be allowed in part and disallowed in part by the issuance of a certificate of overassessment in the amount of $19,611.28. The overassessment resulted in part from the Commissioner's treatment of taxpayer's share of the distribution by Standard Utilities Corporation on January 7, 1930, as partly in excess of the earnings available to Standard Utilities Corporation for distribution as dividends without considering any profit to the corporation from the sale of the 150,000 shares of stock of Standard Power & Light Corporation on January 7, 1930. Other major adjustments not here involved minimized the overassessment determined. (R. 37-38.)

On August 14, 1933, taxpayer filed a second claim for refund in which he challenged the Commissioner's action in adjusting items of income other than those concerned with the dividend distribution of Standard Power & Light Corporation stock on January 7, 1930. (R. 38.)

On May 11, 1935, the Commissioner advised taxpayer of rejection of his second claim for refund, although conceding certain issues raised in the claims other than those involving the distribution received by taxpayer on January 7, 1930. The Commissioner, however, held that the Standard Utilities Corporation had in substance sold the entire 165,000 shares of Standard Power & Light Corporation stock to United States Electric Power Corporation on January 7, 1930, and that the final recomputation of taxpayer's income tax liability for 1930 disclosed a deficiency of income tax barred from assessment by operation of the applicable statute of limitations. (R. 39.)

ARGUMENT

On January 7, 1930, taxpayer received a distribution of $4,746,441.57 from Standard Utilities Corporation, a corporation whose stock was wholly owned by the investment banking partnership of which taxpayer was a participating member. The amount received by taxpayer on January 7, 1930, represented his proportionate interest in the sales price of 165,000 shares of the stock of Standard Power & Light Corporation, long owned by Standard Utilities Corporation but disposed of on that date under the circumstances set out in the foregoing statement. If the stock was actually sold by or for Standard Utilities Corporation, and the proceeds were distributed to the latter's stockholders, the taxpayer admittedly received a fully taxable ordinary dividend.

The court below concluded, in an opinion written by Judge Madden, that the sale was negotiated and effected by the partnership on behalf of the Standard Utilities Corporation. As a fact the court found that the corporation realized $21,176,153.61 profit on the sale. (R. 34.) The dividend to the taxpayer (through the partnership) was thus a distribution of the proceeds of the sale and, being

made wholly from profits, is taxable as ordinary income to the taxpayer.

In a concurring opinion (R. 46-50), Judge Whitaker reached the same result based, however, on the view that taxpayer had received his proportionate share of 150,000 shares of the stock of Standard Power & Light Corporation in kind, and had immediately sold it. Judge Whitaker's reasoning was, in summary, as follows (R. 49): the earnings and profits of Standard Utilities Corporation available for distribution to stockholders on January 7, 1930, from sources other than the sale of the 150,000 shares of Standard Power & Light Corporation stock, totaled $4,361,963.25; since standard Utilities Corporation's cost basis of the shares was $3,010,000, the corporation had sufficient earnings available to cover the entire distribution made in kind on January 7, 1930, and, therefore, the distribution made to taxpayer was fully taxable under Section 115(a) and (b) of the Revenue Act of 1928 (Appendix, *infra*). The theory upon which this concurring opinion is predicated was not urged in the court below, but appears to be supported generally by *Commissioner* v. *Wakefield,* 139 F. 2d 280 (C.C.A. 6); *Commissioner* v. *F. J. Young Corp.,* 103 F. 2d 137 (C.C.A. 3); *Binzel* v. *Commissioner,* 75 F. 2d 989 (C.C.A. 2), certiorari denied, 296 U. S. 579. See, however, *Dean* v. *Commissioner,* 9 T.C. 256, pending on appeal (C.C.A. 3).

The petitioner urges that, because of the different grounds relied on by Judge Madden in the majority opinion and Judge Whitaker in his concurring opinion, the decision of the Court is not supported by the required quorum of three judges even though they reached the same result in dismissing his suit for refund. See Section 138 of the Judicial Code (28 U.S.C. 243).

The ultimate question, however, presented to the court below, as in all tax refund suits, was whether taxpayer was entitled to recover any part of his individual income taxes

paid for the calendar year 1930. See *Lewis* v. *Reynolds*, 284 U. S. 281; *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357. The Court of Claims, with only Judge Littleton dissenting, held that petitioner was not entitled to recover. The statute manifestly does not require the concurrence of any of the three judges in the reasons for a decision, or the grounds upon which the decision is based. The reasons or ground relied upon by the judges of the lower court are not particularly material, if the result is correct. Cf. *Helvering* v. *Gowran*, 302 U. S. 238, 245, 246. Since three of the four judges, who considered the taxpayers' claim in the court below, concurred in the decision that taxpayer was not entitled to recover, and in the dismissal of his suit (R. 52-53), the statutory requirements are plainly met.

The facts in this case bring it squarely within the scope of *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, reversing 143 F. 2d 823 (C.C.A. 5th), and affirming 2 T.C. 531. In that case the Tax Court found as facts (pp. 537-538) that when the negotiations for sale of the assets involved were completed, and the price, time, terms of sale, etc., were agreed upon, the corporation owned the assets; that there was no plan shown for liquidation of the corporation at the time; that the corporation's officers subsequently presented themselves to the purchaser to settle and execute the terms of the earlier agreement; that the corporation's executive officer was acting for the corporation, which later approved his acts; that the conditions, terms of payment, etc., were for the corporation's benefit; that no additional negotiations or re-negotiations with the prospective purchaser occurred after the initial agreement; and that the repudiation of its contract, the dissolution of the corporation, and the transfer of the corporation's assets to the stockholders for the purpose of having them convey the assets to the purchaser were steps in a scheme to make the transaction appear something other than it actually was. The Tax Court

held that the corporation made the sale, and that the transfer of the assets sold to the stockholders for conveyance to the purchaser was simply a matter of form instead of substance, intended only to relieve the corporation of the tax on its profits from the sale. The court further stated that the stockholders were no more than conduits through whom the corporation passed its assets.

In this case, the partnership, as sole stockholder of Standard Utilities Corporation, which, in turn, owned 165,000 shares of Standard Power & Light Corporation stock, entered into a contract for sale of the stock, following careful and exhaustive negotiations. The partnership held itself out not as the owner of the stock but only as the representative or agent of the owner (R. 40). The stock which was the subject of the sale was in escrow at the time the contract of sale was executed. It had been placed there by the partnership under a written contract in which the partnership signed as the representative of the owner, Standard Utilities Corporation. The partnership never owned any of the stock. In the sale contract dated December 21, 1929, the partnership signed as "representing" the owner of 165,000 shares of Standard Power & Light Corporation stock. It did not, however, disclose the principal for which it was acting. In contrast, H. M. Byllesby & Company, and/or Standard Gas & Electric Company, signed both the escrow agreement and the contract of sale as "owner" of the other 165,000 shares of the stock involved.

Every detail of the sale of the Standard Power & Light Corporation stock was worked out in the advance negotiations between the partnership and the prospective purchaser, and even the minutest details were incorporated in the contract of December 21, 1929. That contract was performed exactly as drawn. It was in all respects a sale by the corporation acting through its representative, the partnership. There were no subsequent renegotiations or modi-

fications. The court below noted that the motive in the dividend in kind on January 6, 1930, and the alleged sale of 150,000 of the shares by the individual partners of Ladenburg, Thalmann & Company was to minimize taxes, that is, to enable the Standard Utilities Corporation to avoid taxes on its profits from the sale. (R. 43.) The so-called dividend in kind, of 150,000 of the 165,000 shares sold by the partnership on January 7, 1930, was simply a part of the scheme contrived to accomplish that purpose. It will be noted that the corporation's tax matters are in no way involved in this action.

In the *Court Holding Co.* case, *supra,* this Court said (p. 334):

> The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title. To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

See also *Hellebush* v. *Commissioner,* 65 F. 2d 902 (C. C. A. 6); *Embry Realty Co.* v. *Glenn,* 116 F. 2d 682 (C. C. A. 6); *Taylor Oil & Gas Co.* v. *Commissioner,* 47 F. 2d 108 (C. C. A. 5); *Northwest Utilities Securities Corp.* v. *Commissioner,* 67 F. 2d 619 (C. C. A. 8), certiorari denied, 291 U. S. 684; *Tazewell Electric Light & Power Co. v. Strother,* 84 F. 2d 327 (C. C. A. 4).

In this case the partnership of which taxpayer was a participating member, after irrevocably selling the 165,000 shares of Standard Power & Light Corporation stock for

Standard Utilities Corporation, which owned the stock, caused that corporation to authorize it formally to sell for the corporation's benefit 15,000 of the shares at the price and under the terms already agreed upon. The members of the partnership then caused Standard Utilities Corporation to declare a dividend in kind of the other 150,000 shares sold. Both actions were taken at 1:30 p. m. on January 7, 1930, the date of delivery of the entire 165,000 shares to the purchaser. Since the decision below is thus in harmony with this Court's decision in the *Court Holding Company* case, there should be no occasion for this Court to reexamine the decision merely because a different result was reached under different facts in *Howell Turpentine Co.* v. *Commissioner,* 162 F. 2d 319 (C. C. A. 5), and *United States* v. *Cummins Distilleries Corp.,* 166 F. 2d 17 (C. C. A. 6), relied upon by petitioner (Pet. 9). If mere formalism, as shown by the facts of this case, is not to disguise the substance of the transaction, the petition for certiorari should be denied. Cf. *Griffiths* v. *Commisioner,* 308 U. S. 355, 358, and cases cited.

CONCLUSION

The decision below is in accord with this Court's decision in the *Court Holding Co.* case. There is no occasion for further review. The petition should, therefore, be denied.

Respectfully submitted.

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APRIL, 1948.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of dividend.*—The term "dividend" when used in this title (except in section 203(a)(4) and section 208(c)(1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.

(b) *Source of distributions.*—For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits.

* * * * * * *

(d) *Other distributions from capital.*—If any distribution (not in partial or complete liquidation) made by a corporation to its shareholders is not out of increase in value of property accrued before March 1, 1913, and is not out of earnings or profits, then the amount of such distribution shall be applied against and reduce the basis of the stock provided in section 113, and if in excess of such basis, such excess shall be

taxable in the same manner as a gain from the sale or exchange of property. The provisions of this subsection shall also apply to distributions from depletion reserves based on the discovery value of mines.

• • • • • • •

Judicial Code:

SEC. 138. The Court of Claims shall hold one annual session at the city of Washington, beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the court. Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business: *Provided,* That the concurrence of three judges shall be necessary to the decision of any case. [28 U. S. C. 243.]

Treasury Regulations 74 (1929 ed.):

ART. 627. *Dividends paid in property.*—Dividends paid in securities or other property (other than its own stock) in which the earnings of a corporation have been invested, are income to the recipients to the amount of the market value of such property when receivable by the shareholders. (See, however, section 112 (h) and article 576.) Where a corporation declares a dividend payable in stock of another corporation, setting aside the stock to be so distributed and notifying the shareholders of its action, the income arising to the recipients of such stock is its market value at the time the dividend becomes payable. (See article 333.) Scrip dividends are subject to tax in the year in which the warrants are issued.

U. S. GOVERNMENT PRINTING OFFICE, 1940